Supreme Court, U.S.
FILED
SEP 27 1995
CLERK

No. 95-318

In The

Supreme Court of the United States

October Term, 1995

AURA SYSTEMS, INC., *et al.*,

Petitioners,

vs.

MICHAEL J. FRANKSTON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review a District Court's denial of petitioners' motion to dismiss for improper venue, when petitioners did not appeal the ruling and have falsely stated to this Court that there was no such ruling?

2. Whether this Court should review the dismissal of petitioners' counterclaim when petitioners did not appeal that dismissal?

3. Whether this Court should review the correct application of the choice-of-law rules in effect in Massachusetts at the time this action was filed, although four years later the highest court of Massachusetts announced that it would apply a different choice-of-law rule "for the future"?

4. Whether this Court should review a choice-of-law issue in light of the finding by the Court of Appeals that the District Court's order of summary judgment would have been reversed in light of material issues of disputed fact even if a different state's law were applicable?

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STATEMENT OF JURISDICTION

Petitioners' Statement of Jurisdiction includes an incorrect statement of the issue, along with a correct statement of jurisdiction. The issue in this action was not the choice-of-law rules announced by this Court in *Ferens v. John Deere Co.*, 494 U.S. 516, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990); it appears that petitioners have acknowledged that the District Court below was obliged to apply the choice-of-law rules of Massachusetts, as required by *Ferens*.

The real issue was proper application of the Massachusetts choice-of-law rules in determining which statute of limitations governed respondent's claims in the action. Petitioners' suggestions that *Ferens* was wrongly decided, or should be subject to a limiting construction, were not raised at any stage below, and are therefore not properly included within the Court's jurisdiction on this petition.

STATEMENT OF THE CASE

A. Statement of Facts

This was an action by respondent, Michael J. Frankston ("Frankston"), to collect debts owed to him by the corporate petitioners (collectively "Aura") for loans and for services rendered. Aura has either pleaded or otherwise stipulated that Frankston was at all relevant times a resident of the Commonwealth of Massachusetts, that most of the loans in issue were negotiated by telephone from Aura's offices in California to Frankston's home in Massachusetts, and that Frankston performed substantial services for Aura at his home office in Massachusetts.[1]

---

1. Petitioners' assertion that "All relevant material acts occurred in California" is false. *See* Petitioners' Counterclaim for Damages, ¶ 2 (10a);

(Cont'd)

Aura was a high technology start-up company, of which Frankston was among the founding shareholders and directors, and it had been agreed that payment would not be due to Frankston until Aura had sufficient assets to make payment.[2]

B. Proceedings Below

1. In the District of Massachusetts

In March 1991, plaintiff filed this action in the United States District Court for the District of Massachusetts. Respondents moved to dismiss for improper venue or, in the alternative, to transfer the action to the Central District of California as a matter of convenience pursuant to 28 U.S.C. § 1404(a).[3] The District Court in Massachusetts denied petitioners' motion to dismiss,[4] but granted the alternative motion to transfer for convenience.

(Cont'd)

Defendants' Statement of Uncontroverted Facts and Conclusions of Law, ¶¶ 6, 7, 12 (14a). The Appendix includes only those portions of documents which were included in the Excerpts of Record submitted to the Court of Appeals.

2. Defendants' Statement of Uncontroverted Facts and Conclusions of Law, ¶ 20 (16a).

3. Petitioners' characterization of this motion as to dismiss or to "transfer to the proper venue" is misleading. *See* Motion to Dismiss for Improper Forum, or In the Alterative, Motion to Transfer to Another District (1a).

4. Petitioners' assertion that the Massachusetts Court did not pass on the venue question is false. *See* transcript of hearing (5a, 6a).

2. In the Central District of California

In February 1992, after the transfer to the Central District of California had been effected, petitioners answered and filed counterclaims which specifically relied on California law.

One of petitioners' counterclaims was dismissed on summary judgment, a ruling petitioners did not appeal. Petitioners' other counterclaims were dismissed by stipulation.

Petitioners sought and obtained summary judgment dismissing all of Frankston's claims on the ground that they were barred by California's two-year statute of limitation for breach of oral contract. The District Court held that it had discretion to choose whether or not to apply the statute of limitations of the state in which the action had been filed.

3. In the Court of Appeals

Frankston appealed the grant of summary judgment on the following grounds, which had been asserted to the District Court:

> 1. In a diversity action transferred for convenience, the transferee court is obliged to apply the law, including the choice-of-law rules, that would have been applied by the transferor court (*Ferens v. John Deere Co., supra*, 494 U.S. at 524-25); the transferor court was obliged to apply the law of the state in which it sits (*Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 21 L. Ed. 1188 (1938)); and binding precedents by both the Massachusetts Supreme Judicial Court (*Clark v. Pierce*, 215 Mass. 552, 553, 102 N.E. 1094 (1913)) and the United States Court of Appeals for the First Circuit (*Hemric v. Reed and Prince Manufacturing Co.*, 739 F.2d 1 (1st Cir. 1984)) would have required the transferor court

in this action to apply Massachusetts' six-year statute of limitations to Frankston's claims.

2. Even if California's statutes of limitation could properly be applied to Frankston's complaint, the undisputed facts showed that at least some of Frankston's claims had been timely filed even under California law, and that summary judgment for petitioners on the remaining claims was precluded by genuine disputes as to material facts.

A few weeks before the hearing in the Court of Appeals, the Supreme Judicial Court of Massachusetts announced that, "for the future," Massachusetts courts should no longer automatically apply Massachusetts' own statutes of limitation, but should engage in analysis of various factors to determine which statute of limitation to apply. *New England Telephone & Telegraph Co. v. Gourdeau Construction Co.*, 419 Mass. 658, 664, 647 N.E. 2d 42 (1995). Petitioners urged the Court of Appeals to ignore the explicitly prospective nature of this change in Massachusetts' choice-of-law rules, and to apply the new rule retroactively to this action.

The Court of Appeals rejected petitioners' argument, correctly holding that "the District Court was required to apply the law in effect at the time the action arose." *See* Petition at 5a. The Court of Appeals also noted that "summary judgment may have been inappropriate" even under California law, because there "appear to be material issues of disputed fact"; elaboration of that point was not necessary in light of the resolution of the choice-of-law question. *Id.* at n. 3. Petitioners do not challenge this finding, so issuance of certiorari in this case could not change the result.

The Court of Appeals denied petitioners' subsequent request for a rehearing, without discussion.

REASONS FOR DENYING THE WRIT

There are no special or important reasons for certiorari in this case. The decision of the United States Court of Appeals for the Ninth Circuit is fully in accord with the decisions of this Court, and does not appear to conflict with decisions of any other Court of Appeals. The only federal question presented below is a procedural matter which could not arise in the state courts. Nor is there any possible suggestion that the Court of Appeals here has departed from the accepted and usual course of judicial proceedings; indeed, it had been the District Court in this action which strayed from established law, and the Court of Appeals corrected that error.

I.

CORRECTNESS OF VENUE IN MASSACHUSETTS IS A SHAM ISSUE.

Petitioners base their entire argument on the assertion that venue was not proper in the District of Massachusetts in the first place, and that the District Court for the District of Massachusetts erred by declining to decide petitioners' motion to dismiss on that ground (Petition, p. 2). Both components of this premise are mistaken.

First, the District Court did expressly deny petitioners' motion to dismiss for improper venue. That denial was not incorporated into a formal written order, but the transcript is unambiguous (5a, 6a). Petitioners did not challenge that ruling in the Court of Appeals, so they should not be permitted to challenge it this Court.

Second, the District Court's denial of petitioners' venue motion was correct because venue was proper in Massachusetts. Petitioners' counterclaim affirmatively alleges that respondent was at all times a resident of Massachusetts (10a), and petitioners' own statement of "Uncontroverted Facts" in support of their summary judgment motion acknowledged that many of the contracts at issue in the litigation were entered into in telephone conversations between petitioners in California and respondent in Massachusetts (14a), and that a substantial portion of respondent's performance of the contracts was completed in Massachusetts (*id.*). Since venue could properly be founded on those contacts, the denial of petitioners' venue motion was correct, and petitioners' choice not to appeal it was sensible.

II.

IT IS NOT NECESSARY THAT EVERY CLAIM IN AN ACTION BE GOVERNED BY THE LAW OF THE SAME STATE.

One recurrent theme in the petition is that it seems unfair that the timeliness of the complaint, which was filed in Massachusetts by a Massachusetts resident relying on Massachusetts law, be governed by Massachusetts law, while California law was applied to the counterclaim filed in California by California residents affirmatively relying on California law. Again, petitioners did not appeal the dismissal of their counterclaim, so that issue is not properly before this Court.

Moreover, it has been established by this Court that the laws of different states could govern procedural and substantive aspects of a single claim. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 108 S. Ct. 2117, 100 L. Ed. 2d 743 (1988). A suggestion that all aspects of all claims must be governed by the laws of the same state, regardless of either traditional or modern choice-of-

law principles, would turn decades of diversity jurisprudence inside out.

Moreover, petitioners note that California's statute of limitations would be applied to bar the counterclaim under either California or Massachusetts choice-of-law rules, so there is no federal question here (*see* Petition at p. 5, n. 8).

III.

THE DISTRICT COURT WAS BOUND TO APPLY THE LAW IN EFFECT IN MASSACHUSETTS WHEN THE ACTION WAS FILED.

Four years after this action was filed, Massachusetts adopted a new choice-of-law rule, "for the future." *New England Telephone & Telegraph Co. v. Gourdeau Construction Co.*, 419 Mass. 658, 647 N.E. 2d 42 (1995). Petitioners seize upon this as the basis for arguing that the Court of Appeals erred by reversing a "correct prediction" of this change of law.

However, the District Court in this diversity action had no privilege to predict changes in state law. It was required to apply the law in effect at the time the action was filed. *E.g., In re: Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986), *reh'g denied, op. modified*, 810 F.2d 1517 (1987).

Petitioners try to evade this sensible and practical rule by arguing that silence from the highest court in Massachusetts since 1913 should be construed as an indication that there simply was no law in effect in Massachusetts when this action was filed. However, the lower courts in Massachusetts have consistently applied the rule set forth by the Massachusetts Supreme Judicial Court in 1913. *See, e.g., Wilcox v. Riverside Park Enterprises*, 21

Mass. App. 419, 421, 487 N.E. 2d 860, 861 (Mass. App. 1986), *rev'd on other grounds*, 399 Mass. 533 (1987). Silence from the Supreme Judicial Court meant no more than that the law was firmly settled.

Moreover, the federal district court in Massachusetts would have been bound by the holdings of the United States Court of Appeals for the First Circuit, which had specifically disapproved a prediction that Massachusetts might change its law and instructed the Massachusetts district court to continue applying the law as it was. *Hemric v. Reed and Prince Manufacturing Co.*, 739 F.2d 1 (1st Cir. 1984).

Perhaps most significant, the "prediction" of a change of Massachusetts' law in this action was premature, because the Massachusetts Supreme Judicial Court did have occasion to confirm that the traditional rule was still the law in Massachusetts, as recently as 1994 (several months after the District Court in California made its erroneous "prediction"). *Cosme v. Whitin Machine Works, Inc.*, 417 Mass. 643, 645, 632 N.E. 2d 832, 834 (1994).

IV.

A DIFFERENT CHOICE-OF-LAW RULE WOULD STILL BRING THE SAME RESULT.

The Court of Appeals acknowledged that, even if California's statute of limitations were applied to this case, the summary judgment order would still have been reversed (Petition at 5a, n. 3). As petitioners have not challenged that finding, certiorari would merely delay, but not change, the result.

CONCLUSION

Shorn of its misrepresentations of the factual and procedural record below, the petition has nothing left of substance. It should be denied.

Respectfully submitted,

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APPENDIX A — DEFENDANTS' MOTION TO DISMISS FILED NOVEMBER 15, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Filed by clerk 11/15/91]

No. 91-10806C

Docketed: 91
6232HLH (CTx)

MICHAEL FRANKSTON,

Plaintiff,

v.

AURA SYSTEMS, INC.; CYPHER MASTER, INC.; INNOVATIVE INFORMATION SYSTEMS; and ZVI KURTZMAN,

Defendants.

MOTION TO DISMISS FOR IMPROPER FORUM, OR, IN THE ALTERNATIVE, MOTION TO TRANSFER TO ANOTHER DISTRICT

Pursuant to Fed. R. Civ. P. 12(b)(3), defendants Aura Systems, Inc., Cypher Master, Inc., Innovative Information Systems, and Zvi Kurtzman move this Court to dismiss Plaintiff's Complaint for improper venue. In the alternative, defendants move this Court to transfer the action to a more convenient forum pursuant to 28 U.S.C. Section 1404.

Appendix A

The grounds for this action are set forth in defendants' Memorandum of Law and the Declarations of Zvi Kurtzman and Matthew P. Todd filed herewith.

Respectfully submitted,
AURA SYSTEMS, INC., CYPHER MASTER, INC., INNOVATIVE INFORMATION SYSTEMS, and ZVI KURTZMAN,

By their attorneys,

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Dated: July 12, 1991

Appendix A

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within document by hand upon all counsel of record.

s/ Barbara E. Chernoff
Barbara E. Chernoff

July 12, 1991

APPENDIX B — EXCERPTS OF TRANSCRIPT OF HEARING

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
No. 91-10806-C

MICHAEL FRANKSTON,

Plaintiff,

v.

AURA SYSTEMS, ET AL.,

Defendants.

HEARING

BEFORE THE: THE HON. ANDREW A. CAFFREY
SENIOR JUDGE
U.S. DISTRICT COURT

APPEARANCES:

David S. Mackey, Esq.
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on behalf of the Plaintiff

Matthew P. Todd, Esq.
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on behalf of the Defendants

Appendix B

Courtroom No. 1
Post Office & Courthouse Bldg.
Boston, Massachusetts 02109
September 18, 1991

Barbara Sakurai
Official Court Reporter
1221 Post Office & Courthouse Building
Boston, Massachusetts 02109

Method of Reporting: Stenotype

[The next page in the record in the Court of Appeals was p. 9 of the original transcript.]

the Defendants.

Mr. Frankston lives and works in Massachusetts, and did so all the times that are relevant to this particular case. And the Defendants, as Mr. Todd has indicated, reside in California.

Now, the Defendants have filed what is really two motions: One is a Motion to Dismiss for Improper Venue, and then, in the alternative, a Motion to Transfer the Case out to California.

THE COURT: I am only interested in the Motion to Transfer. I will deny the Motion to Dismiss for Improper Venue.

MR. MACKEY: All right. That is fine, your Honor.

I can address the Motion to Transfer very briefly, in one sentence. This Court has held time and time again in the Homeowners Funding Corporation case, and in the Berrigan case

that we have discussed in our brief, there is a presumption in favor of the Plaintiff's choice of forum, and that it is the Defendant who bears the burden of showing that transfer is warranted.

I believe the statute provides the transfer is warranted where the interests of justice so require and where it would be more convenient for the parties and for the witnesses.

[The next page in the record in the Court of Appeals was page 11 of the original transcript.]

whether or not their testimony is relevant. To say the least, I would be surprised if he needed to bring seven or eight corporate officers here to testify in this matter.

The standard under 1404, again, is that the Defendant bears the burden of proof on the issue. Simply shifting the inconvenience from one party to another is not sufficient rationale, and, therefore, Mr. Frankston, the Plaintiff, respectfully requests that the Defendants' motion be denied.

THE COURT: All right. Thank you.

Well, I am going to rule that the Motion to Dismiss for Improper Venue is denied, and that the Motion for a Transfer under 1404(a) is allowed, because of the fact that Mr. Todd has listed eight witnesses he represented to the Court are material to the preparation of his defense. And, in the interests of justice and the convenience of the witnesses and parties, I am going to transfer the case to the Central District of California.

MR. TODD: Thank you, your Honor.

Appendix B

I want to make the record clear that I believe there are more witnesses. I don't want that list to be an all-inclusive list. I have a good-faith belief that there are more than those eight witnesses. Those are just the eight that I could name off the top of my head here today.

THE COURT: All right.

[The remainder of the original transcript was not included in the record in the Court of Appeals.]

APPENDIX C — COUNTERCLAIM FOR DAMAGES; DEMAND FOR JURY TRIAL FILED FEBRUARY 19, 1992

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed by clerk 2/19/92]

No. CV-91-6232JMI (CTx)

MICHAEL FRANKSTON,

Plaintiff,

vs.

AURA SYSTEMS, INC., CYPHER MASTER, INC., INNOVATIVE INFORMATION SYSTEMS, and ZVI KURTZMAN,

Defendants.

Appendix C

AURA SYSTEMS, INC., a Delaware corporation, CYPHER MASTER, INC., INNOVATIVE INFORMATION SYSTEMS, ZVI KURTZMAN,

Counterclaimants,

vs.

MICHAEL FRANKSTON,

Counterdefendant.

COUNTERCLAIM FOR DAMAGES;
DEMAND FOR JURY TRIAL

Counterclaimants AURA SYSTEMS, INC., a Delaware corporation, (hereinafter "AURA"), CYPHER MASTER, INC., (hereinafter "CMI"), INNOVATIVE INFORMATION SYSTEMS (hereinafter "IIS") and ZVI KURTZMAN, allege as follows:

PRELIMINARY ALLEGATIONS

1. Counterclaimants: AURA is now and at all times herein relevant was, a corporation duly organized under the laws of the State of Delaware and authorized to do business and doing business in the County of Los Angeles, State of California. In 1988, AURA purchased a corporation known as CYPHER MASTER INC., (hereinafter "CMI") and has operated a company known as INNOVATIVE INFORMATION SYSTEMS (hereinafter "IIS") as a subsidiary. ZVI KURTZMAN was and is a resident of the County of Los Angeles, State of California and at all relevant times herein, was an officer and director or AURA, CMI and IIS.

Appendix C

2. Counterdefendant: Michael Frankston (hereinafter "FRANKSTON") is now and at all times herein relevant was, a resident of the State of Massachusetts. From 1986 through January, 1987, FRANKSTON served as the chief financial officer of CMI. From 1986 through February, 1987, FRANKSTON served on the board of directors of IIS. From February, 1987 through January, 1989, FRANKSTON served on the board of directors of AURA. In 1986, when FRANKSTON first became involved with the AURA, CMI and IIS, FRANKSTON was a wealthy investor who professed

[The remainder of the original document was not included in the record in the Court of Appeals.]

APPENDIX D — DEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV91-6232LGB(CTx)

MICHAEL FRANKSTON,

Plaintiff,

v.

AURA SYSTEMS, INC., CYPHER MASTER, INC., INNOVATIVE INFORMATION SYSTEMS and ZVI KURTZMAN,

Defendants.

AND RELATED COUNTERCLAIMS

Appendix D

DEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

[Central District
Local Rule 7.14.1]
Date: 9/13/93
Time: 9:00 am
Dept:
Hon. Lourdes Baird
Accompanying papers: Notice of Motion and Motion, Memorandum of Points and Authorities, Declaration of Frank T. Phelan, Declaration of Margaret Mullin Weems in Support of Defendants' Motion for Summary Judgment and Proposed Order.

Pursuant to the Federal Rules of Civil Procedure, Rule 56 and Local Rule 7.14.1, defendants Aura Systems, Inc. ("Aura"), Cypher Master Inc. ("CMI"), Innovative Information Systems ("IIS"), and Zvi Kurtzman ("Kurtzman") (collectively, "defendants") serve the following Statement of Unconverted Facts and Conclusions of Law in support of defendants' motion for summary judgment.

UNCONTROVERTED FACTS

1. Federal jurisdiction is based on diversity of citizenship of the parties.

[Pre-trial Conference Order at 2:17-27, Declaration of Margaret Mullin Weems ("Weems Decl.") at Exhibit "G".]

Appendix D

2. Defendant Aura Systems, Inc. ("Aura") has its principal place of business in El Segundo, California.

[Complaint and Jury Demand ("Complaint") at 2, ¶ 5, Weems Decl. at Exhibit "A".]

3. Defendant Cypher Master, Inc. ("CMI") has its principal place of business in El Segundo, California.

[Complaint at 2, ¶ 6, Weems Decl. at Exhibit "A".]

4. Defendant Innovative Information Systems, Inc. ("IIS") is a California corporation which has its principal place of business in El Segundo, California.

[Complaint at 2, ¶ 7, Weems Decl. at Exhibit "A".]

5. Defendant Zvi Kurtzman ("Kurtzman") is a citizen of California who resides in Los Angeles, California. Kurtzman is the president and principal executive officer of Aura and is a member of its board of directors. From 1984 to 1988, Kurtzman served as president of CMI and was a member of its board of directors. From 1984 to 1987, Kurtzman was also president of IIS and a member of its board of directors. At all times relevant to this Complaint, Kurtzman directed and controlled the operations of Aura, CMI and IIS.

[Complaint at 3, ¶ 8, Weems Decl. at Exhibit "A".]

6. Plaintiff Michael Frankston ("Frankston") is a resident of the Commonwealth of Massachusetts, but through the beginning of 1988 he was also a resident of the State of California.

Appendix D

Frankston had his own office at the defendant companies' facilities in California. From his home office in Massachusetts, Frankston also performed investing, research and planning for the defendant, California companies.

[Complaint at 2, ¶ 4, Weems Decl. at Exhibit "A"; Answer to Counterclaim for Damages ("Counterclaim Answer") at 2:10-13, Weems Decl. at Exhibit "F"; Deposition of Michael Frankston ("Frankston Depo.") at 7:7-8:4, 12:24-13:6 (15:3-12), 753:18-22, 754:18-22, Weems Decl. at Exhibit "E".]

7. From May 1986 through October 1988, Frankston performed a variety of consulting tasks for Aura, CMI and IIS related to the development and marketing of Aura's, CMI's and IIS's new products. From August, 1986 until January 1987, Frankston was the chief financial officer of CMI. From February 1987 until January 1989, Frankston served on the board of directors of Aura. From October 1986 until February 1987, Frankston served on the board of directors of IIS.

[Complaint at 4, ¶ 9, Weems Decl. at Exhibit "A"; Affidavit of Michael Frankston ("Frankston Affidavit") at 2, ¶ 3, Weems Decl. at Exhibit"H".]

[The next page in the record in the Court of Appeals was page 5 of the original document.]

12. Beginning in August 1986, through December 1986, Kurtzman made telephone requests for loans of money to Frankston. The telephone requests were made by telephone from the company's offices in California. Frankston responded to these requests by delivering funds to the defendant companies' offices in California.

Appendix D

[Frankston Affidavit at 6, ¶ 5, Weems Decl. at Exhibit"H".]

13. All the contracts at issue were oral.

[Plaintiff's Contentions of Fact and Law ("Plaintiff's Contentions") at 3:3, Weems Decl. at Exhibit "J".]

14. In May 1986 Kurtzman, CMI, IIS and Frankston agreed that Frankston would render consulting services to CMI and IIS and in return CMI and IIS would pay to Frankston $10,000 per month.

[Complaint at 4-5, ¶ 17, Weems Decl. at Exhibit "A".]

15. On or about August 30, 1986, at the specific request of Kurtzman, Frankston gave $49,000 to CMI to purchase stock in a company called Instant Software Generation, Inc. ("ISG").

[Complaint at 3-4, ¶ 11, Weems Decl. at Exhibit "A"; Declaration of Michael Frankston in Support of Motion for Partial Summary Judgment at 1:26-2:2, Weems Decl. at Exhibit "K".]

16. In October 1986, Frankston was granted options on 49,500 shares of stock of AmCan, the parent company of CMI, which were exercisable at $5.25 Canadian and were due to expire on October 27, 1988. Frankston did not exercise his options on these shares.

[Complaint at 13, ¶ 60 and at 14 ¶ 62, Weems Decl. at Exhibit "A"; Plaintiff's Contentions at 8:7-18, Weems Decl. at Exhibit "J".]

Appendix D

17. On or about November 24, 1986, Frankston loaned $29,600 to one of the defendants.

[Complaint and Jury Demand at 3-4, ¶ 11, Weems Decl. at Exhibit "A".]

18. In late 1986, Frankston loaned Kurtzman and CMI 11,250 shares of AmCan stock. Kurtmzan and CMI promised to return the shares to Frankston upon demand or, if the shares were not available at the time of the demand, as soon thereafter as the shares were available.

[Complaint at 9-10, ¶ 39, Weems Decl. at Exhibit "A".]

19. On or about December 30, 1986, at the specific request of Kurtzman, Frankston lent $35,000 to CMI.

[Complaint at 3-4, ¶ 11, Weems Decl. at Exhibit "A"; Declaration of Michael J. Frankston in Support of Motion for Partial Summary Judgment at 2:13-15, Weems Decl. at Exhibit "M".]

20. Kurtzman, CMI and IIS agreed to repay the loans to Frankston upon demand, or if the funds were not available at the time of demand, as soon thereafter as CMI, IIS or Kurtzman had the funds available.

[Complaint at 4, ¶ 12, Weems Decl. at Exhibit "A".]

21. In the spring of 1987, $6,318.85 was lost on a stock investment. The funds were deducted from Frankston's personal trading account. Kurtzman agreed that Aura, CMI or IIS would

repay the $6,318.85 on demand, or, if the funds were not available at the time of demand, as soon thereafter as the funds were available.

[Complaint at 9, ¶¶ 35-36, Weems Decl. at Exhibit "A".]

22. In September 1988 Frankston travelled to Los Angeles to meet Kurtzman. Kurtzman reaffirmed the agreement to pay Frankston his salary. Kurtzman agreed that Frankston would thereafter perform services on a "half-time" basis for a minimum of $5,000/month for services rendered after September, 1988, with payment to be made at the end of every month.

[Complaint at 6, ¶ 22, Weems Decl. at Exhibit "A".]

23. All of the agreements alleged to have been made in the Complaint and in the Counterclaim were oral.

[Pre Trial Conference Order at 5:23-24, Weems Decl. at Exhibit "G".]

24. On September 23, 1988 (the "September Meeting"), Frankston attended a meeting at the offices of Aura, in Los Angeles County, to discuss, among other things, stock options Frankston contemplated offering or had offered to employees of the company. The options regarded his own shares in Aura.

[Frankston Depo. at 365:8-12, 366:4-20, Weems Decl. at Exhibit "E".]

25. At the September 1988 meeting, Frankston stated to Kurtzman that he estimated the defendants owed him $250,000.

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[Frankston Depo. at 350:10-15, Weems Decl. at Exhibit "E".]

26. Frankston accepted a check in the amount of $28,990 at the end of a November 1, 1988 meeting in Los Angeles County.

[Frankston Depo. at 440:15-25, Weems Decl. at Exhibit "E".]

27. On November 2, 1988, Frankston met with Kurtzman in Los Angeles County. They orally agreed to prepare lists of payments and loans and obligations between each other and the companies.

[Frankston Depo. at 455:25-456:12, Weems Decl. at Exhibit "E".]

28. In December 1988, Frankston had a telephone conversation with Kurtzman. At that time they discussed items related to payments and loans and obligations between each other and the companies.

[Frankston Depo. at 463:21-24, Weems Decl. at Exhibit "E".]

29. The December 1988 telephone conversation did not result in any agreement between Frankston and Kurtzman.

[Frankston Depo. at 471:9-14, and Exhibit 5 (Frankston's handwritten notes), Weems Decl. at Exhibit "E".]

30. Frankston has not performed any service of any sort for

any of the defendants-counterclaimants since resigning from the Board of Directors of Aura in January, 1989.

[Plaintiff's Statement of Unconverted Facts and Conclusions of Law at 2:21-23, Weems Decl. at Exhibit "O"; Declaration of Michael J. Frankston at ¶ 9, Weems Decl. at Exhibit "M".]

31. Defendants could afford to repay the loans to Frankston at least as of February 28, 1989.

[Declaration of Frank T. Phalen at ¶ 2, Weems Decl. at Exhibit "L".]

32. Frankston's next communication with Kurtzman was to mail, by certified mail, return receipt requested, a letter dated March 1, 1989.

[Frankston Depo. at 473:2-5, Weems Decl. at Exhibit "E"; Weems Decl. at Exhibit "C" (March 1, 1989 letter); Complaint at Exhibit "A".]

33. Frankston sent the letter dated March 1, 1989 to Kurtzman on or around the beginning of March, 1989.

[Frankston Depo. at 473:2-5, Weems Decl. at Exhibit "E".]

34. The March 1, 1989 letter was delivered on March 14, 1993.

[Weems Decl at Exhibit "C" at 4. (March 1, 1989 letter, return receipt)]

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35. Neither Kurtzman nor any other representative of any of the defendant companies responded to Frankston's March 1, 1989 letter.

[Complaint at 12, ¶ 52, Weems Decl. at Exhibit "A".]

36. The Complaint in this action was filed March 13, 1991.

[Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law at 2:24-25, Weems Decl. at Exhibit "O"; Declaration of Joshua Tropper at ¶ 2, Weems Decl. at Exhibit "N".]

37. Between November 1, 1988 and the present, Aura did not pay any amount to Frankston.

[Pre Trial Conference Order at 5:12-13, Weems Decl at Exhibit "G".

[The remainder of the original document was not included in the record in the Court of Appeals.]